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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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PACIFIC LIGHTING CORPORATION,
FREDRICKS DEVELOPMENT CORPORATION, and
DUNN PROPERTIES CORPORATION,

*Petitioners,*

v.

MGW, INC.

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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## QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment is violated by state laws that permit limitless jury discretion to impose financial punishments in the absence of explicit statutory or common law standards and limits establishing in advance the conduct that may be punished and the amount of punishment that may be inflicted for engaging in such conduct, and, if so, whether the $2,000,000 punitive damage award imposed in this case violates that Clause.

## STATEMENT OF INTERESTED PARTIES

In addition to the parties named in the caption, defendants Pacific Lighting Real Estate Group, formerly "Pacific Real Estate Projects, Inc." ("PREP"), Home Capital Corporation and Humboldt Financial Services Corporation were parties in the court below. Pursuant to Rule 29.1 of the Rules of this Court, the following constitutes a list of all parent companies and non-wholly owned subsidiaries of petitioners:

Pacific Enterprises Corporation ("Pacific Enterprises"), formerly "Pacific Lighting Corporation," was the parent corporation of Fredricks Development Corporation ("Fredricks"), Dunn Properties Corporation ("Dunn"), and PREP, until 1987, when Fredricks, Dunn, and another Pacific Lighting Corporation subsidiary (The Presley Companies) were sold and reorganized.

Pacific Enterprises presently owns 93.29% of Southern California Gas Company, which in turn owns 4% of the Coalition Undertaking Remedial Efforts, Inc. Pacific Enterprises also owns 100% of The Thrifty Corporation, which owns 62.5% of FTM Sports Corporation ("FTM"). FTM owns 40% of Cactus Golf, Inc. and 80% of American Diversified Sports, Inc. The Thrifty Corporation also owns 100% of Gart Brothers Sporting Company, which owns 89% of Sports Castle Travels, Inc.

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v.

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---

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

---

Pacific Lighting Corporation ("Pacific Lighting"), Fredricks Development Corporation ("Fredricks"), and Dunn Properties Corporation ("Dunn") respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District. That court affirmed a jury verdict of $2,000,000 in punitive and $558,000 in compensatory damages, plus interest, against petitioners for alleged tortious conduct in connection with an alleged oral contract. The court below expressly rejected federal constitutional objections to the punitive damage award.

## OPINIONS AND ORDERS BELOW

The April 30, 1990 opinion of the California Court of Appeal was ordered by that court not to be published, *see* note 11, *infra*, and accompanying text, and is reproduced in App. A, *infra*, 1a-14a. That court's May 29, 1990 order denying rehearing is unreported and reproduced in App. B, *infra*, 15a. The July 18, 1990 order of the Supreme Court of California denying discretionary review of this case is unreported and reproduced in App. C, *infra*, 16a.

## JURISDICTION

In its April 30, 1990 opinion, the California Court of Appeal expressly rejected the federal due process question presented in the Petition. On July 18, 1990, the Supreme Court of California declined to review this case, and this Petition is being filed within ninety days of that date. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

## STATEMENT OF THE CASE

### A. Statement of Facts

This case involves a $2,000,000 punitive damage award imposed by a jury against Pacific Lighting and its two former subsidiaries, Fredricks, a developer of

residential real estate, and Dunn, a developer of commercial real estate, for "tortious interference with prospective economic advantage" and tortious conspiracy. Respondent MGW, a commercial real estate brokerage and investment company, alleged that Mr. Malcolm Waitt, Jr., the owner and sole employee of MGW, entered into an oral broker's agreement with Fredricks under which Fredricks "would see [that Waitt] was fairly compensated" if Mr. Waitt brought a real estate opportunity to Fredricks for which a broker's fee was not paid by the seller. App. A, *infra*, 2a.

In February 1983, Mr. Waitt brought a newspaper article to Fredricks' attention that discussed an impending sale of interests in a real estate development project known as Rancho Carmel. Fredricks informed Mr. Waitt that neither it nor its parent company, Pacific Lighting, were aware of the opportunity. App. A, *infra*, 3a. Fredricks and Dunn ultimately entered into a joint venture in the Rancho Carmel development with two other companies. The joint venture interest was purchased on their behalf by Pacific Real Estate Projects, Inc. ("PREP"), another Pacific Lighting subsidiary in the business of land development.

Fredricks refused to pay Mr. Waitt a broker's fee, asserting that, unbeknownst to Fredricks, its sister corporation and partner in the joint venture, Dunn, had learned of the opportunity before Mr. Waitt brought it to Fredricks, *see* App. A, *infra*, 4a, and thus Fredricks was not obligated to pay a broker's fee under the terms of the oral agreement.

Based upon Fredricks' refusal to pay Mr. Waitt a broker's fee, MGW brought suit against Pacific Light-

ing, Fredricks, Dunn, and PREP alleging, *inter alia*, breach of an oral contract, "tortious breach of the covenant of good faith and fair dealing, conspiracy and tortious interference with prospective economic advantage."[1] App. A, *infra*, 4a. The trial court dismissed all of MGW's contract-related claims because the oral contract violated the statute of frauds. However, the jury returned a verdict of $558,000 in compensatory damages and $2,000,000 in punitive damages on the remaining claims.[2]

The trial court granted Pacific Lighting's motion for judgment notwithstanding the verdict and its motion for a new trial on state law grounds. *See* App. A, *infra*, 5a. MGW appealed that ruling, and Fredricks, Dunn and PREP appealed the trial court's judgment against them.

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[1] MGW claimed that Pacific Lighting and Dunn "interfered" with the oral agreement between Fredricks and MGW by telling Fredricks that they had already known about the Rancho Carmel opportunity, and that Fredricks conspired with them when it refused to pay the commission.

[2] App. A, *infra*, 4a. The jury apportioned the $2,000,000 punitive damage award as follows: Pacific Lighting, $800,000; Dunn, $800,000; and Fredricks, $400,000. Under California law, all of the petitioners, as well as PREP, are jointly and severally liable for the compensatory damage award. The compensatory damage award was paid in full on September 21, 1990.

The trial court granted a nonsuit in favor of PREP on the tortious interference claim; the jury found PREP liable for conspiracy, but did not assess punitive damages against PREP. The trial court also granted a nonsuit on all claims in favor of defendants Home Capital Corporation and Humboldt Financial Services Corporation, the other two participants in the Rancho Carmel project. App. A, *infra*, 4a-5a.

**B. Presentation and Decision of the Federal Question**

In the Court of Appeal, Pacific Lighting argued, *inter alia*, that the imposition of punitive damages in this case violated the Due Process Clause of the Fourteenth Amendment because California law permits "uncontrolled" juries to impose "unlimited punishments in which the amount imposed is calculated on an *ad hoc* basis in each case." App. D, *infra*, 20a. It also contended that the "unspecified, nebulous, and ultimately meaningless" standards governing punitive damages "only serve[ ] to multiply a defendant's uncertainty as to the punishment," resulting in "capricious awards" and "nullif[ying] the very concepts of fair play and justice embodied in the Due Process Clause . . . ." App. D, *infra*, 20a-21a.

On April 30, 1990, in an opinion ordered not to be published pursuant to Rule 977 of the California Rules of Court, the Court of Appeal reversed the grant of a new trial and judgment notwithstanding the verdict in favor of Pacific Lighting, reinstated the punitive damage judgment against Pacific Lighting, and affirmed the trial court's judgment in all other respects. App. A, *infra*, 14a. The Court of Appeal expressly rejected Pacific Lighting's federal constitutional challenges to the punitive damage award.[3] Although the

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[3] "There can be no question as to the proper presentation of a federal claim when [the court below] passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959). *Accord New Jersey* v. *Portash*, 440 U.S. 450, 455 (1979); *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974). Although petitioners Dunn and Fredricks did not raise a federal due process challenge to the punitive damage award in the Court of Appeal, Pacific Lighting's challenge necessarily placed the entire punitive damage award in constitutional jeopardy. Furthermore, as indicated by the Court of Appeal's opinion

court below took note of this Court's grant of certiorari in *Pacific Mutual Life Insurance Co.* v. *Haslip, stay granted*, 110 S. Ct. 710 (1990), *cert. granted*, 110 S. Ct. 1780 (1990) (argued Oct. 3, 1990), it stated simply that "punitive damages are constitutional under . . . the due process provisions of the Fourteenth Amendment," App. A, *infra*, 12a, relying upon two California cases, *Bertero* v. *National General Corp.*, 13 Cal. 3d 43, 66 n.13, 529 P.2d 608, 118 Cal. Rptr. 184 (1974), and *Zhadan* v. *Downtown L.A. Motors*, 66 Cal. App. 3d 481, 501-02, 136 Cal. Rptr. 132 (1976). Both *Bertero* and *Zhadan* concluded that California's punitive damage statute sufficiently defined the proscribed conduct and the potential punishment for purposes of due process.[4]

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in this case, *see* App. A, *infra*, 12a, the Supreme Court of California unequivocally has rejected both federal and state due process attacks on that State's vague and open-ended punitive damage system. Under these circumstances, it was not necessary for Dunn and Fredricks to raise such issues in the trial court or Court of Appeal as a matter of state law. *See, e.g., Moradi-Shalal* v. *Fireman's Fund Insurance Companies*, 46 Cal. 3d 287, 292, 758 P.2d 58, 250 Cal. Rptr. 116 (1988) (defendant was not required to raise issue in the lower courts because "clearly it would have been pointless for defendant to urge either the trial or appellate court to overrule one of our decisions").

[4] In *Bertero*, the Supreme Court of California rejected an attack on *Cal. Civ. Code* § 3294 as "unconstitutionally vague because it fails to provide sufficient guidance for the trial courts charged with implementing it." 13 Cal. 3d, at 66 n.13. The court noted that the statute "merely codifies" the common law "principles" for determining whether punitive damages may be imposed and "how the amount shall be determined," *id.*, and concluded that therefore the statute was not subject to a due process challenge on vagueness grounds. The court also observed that § 3294 previously had been upheld against constitutional

Petitioners sought review of the Court of Appeal's judgment in the Supreme Court of California, contending, *inter alia*, that the Due Process Clause prohibits the "essentially unrestrained discretion" of juries to impose punitive damages in unlimited amounts. Petitioners argued that this case "raises the same federal constitutional objections to punitive damage awards" as are before this Court in *Pacific Mutual* and urged the Supreme Court of California to grant review or, alternatively, to hold the case without briefing until this Court decided *Pacific Mutual*. The Supreme Court of California, without opinion, denied review on July 18, 1990. *See* App. C, *infra*, 16a.[5]

## REASONS FOR GRANTING THE WRIT

On four occasions in the past five years this Court has accepted for review cases that involved the question whether the "lack of sufficient standards governing punitive damage awards . . . violates the Due Process Clause of the Fourteenth Amendment." *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986); *see also Pacific Mutual Life Insurance Co.* v. *Haslip, cert. granted*, 110 S. Ct. 1780 (1990); *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Dis-*

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challenge "on several occasions." *Id.* The Court of Appeal in *Zhadan*, relying upon *Bertero*, also rejected the argument that *Cal. Civ. Code* § 3294 violates due process principles "because of its lack of a 'precise standard by which to fix the quantum of property . . . to be deprived . . . .' " 66 Cal. App. 3d, at 501.

[5] On August 30, 1990, Justice Kennedy granted petitioners' application for a stay of the punitive damage portion of the judgment (A-156). On September 21, 1990, Justice Kennedy denied respondent's motion to vacate the stay.

*posal, Inc.*, 109 S. Ct. 2909 (1989); *Bankers Life and Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988). Petitioners' Due Process Clause objections to punitive damages are indisputably substantial and worthy of review by this Court.[6]

As exemplified by this case, the California system of state-imposed punitive fines is particularly inconsistent with due process. By express statute, California assesses punitive damages only in cases "*not* arising from contract." *Cal. Civ. Code* § 3294(a) (Deering Supp. 1990) (emphasis added). Yet in this case, a California appellate tribunal, in an opinion that by law may not "be cited or relied upon . . . in any other action or proceeding," *California Rules of Court, Rule* 977,

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[6] Similar issues are before the Court in *Pacific Mutual*, as well as a number of other cases. *See, e.g., Eichenseer* v. *Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989) ($500,000 punitive damage award), *stay granted*, 110 S. Ct. 1468 (1990), *cert. pending* (No. 89-1303); *George* v. *International Society for Krishna Consciousness of California*, 213 Cal. App. 3d 729, 262 Cal. Rptr. 217 (1989) (subsequently ordered to be depublished) ($2,500,000 punitive damage award), *stay granted*, 110 S. Ct. 1804 (1990), *cert. pending* (No. 89-1399); *Wollersheim* v. *Church of Scientology*, 212 Cal. App. 3d 872, 260 Cal. Rptr. 331 (1989) ($2,000,000 punitive damage award), *cert. pending* (No. 89-1361); *Hospital Authority of Gwinnett County* v. *Jones*, 386 S.E.2d 120 (Ga. 1989) ($1,300,000 punitive damage award), *cert. pending* (No. 89-1315); *General American Life Insurance Company* v. *Simmons*, 562 So. 2d 140 (Ala. 1989) ($600,000 punitive damage award), *stay granted*, June 4, 1990 (A-845) (Kennedy, Circuit Justice), *cert. pending* (No. 90-73); *Massachusetts Mutual Life Insurance Co.* v. *Collins*, No. 88-949 (Ala. 1990) ($750,000 punitive damage award), *cert. pending* (No. 90-244); *Buckley* v. *Ellis*, 790 P.2d 875 (Colo. Ct. App. 1989) ($125,000 punitive damage award), *cert. pending* (No. 90-191).

reinstated the portion of the jury's punitive damage verdict that had been overturned by the trial court, and affirmed the jury's original $2,000,000 punishment for failure to pay a commission "pursuant to an oral broker's agreement," App. A, *infra*, 2a, an alleged contract that is explicitly made unenforceable by California's statute of frauds. App. A, *infra*, 4a, 13a. The Court of Appeal did not engage in any apparent analysis of the amount of the award.

The California courts have repeatedly rejected federal (and state) constitutional challenges to this increasingly erratic system. Only this Court can resolve the due process question presented in the Petition.

**A. The Court Should Grant Review to Decide the Extent to Which the Due Process Clause of the Fourteenth Amendment Limits the Otherwise Unfettered Discretion of Juries to Inflict Punitive Damages in Civil Actions Involving Private Parties**

In California, as in most jurisdictions, the law of punitive damages allows punishment for deviation from vague, elastic and evolving "standards" of conduct and affords substantially unfettered discretion to juries to render a punishment in virtually any amount. Indeed, California Civil Code § 3294, which purports to define the circumstances and manner in which punitive damages may be imposed, articulates neither limits nor objective factors for determining the level of punishment necessary to achieve the State's goals of retribution and deterrence in a particular case. *See Cal. Civ. Code* § 3294 (Deering Supp. 1990).

Nor does the common law provide any meaningful guidance. The California Court of Appeal has determined that no limits or formulae exist for calculating

punitive damages and that that is precisely the way it should be in California:

> The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns. *The process is further complicated by the lack of objective criteria from either the Legislature or the courts as to "how much" is necessary to punish and deter.*
>
> We have examined a number of appellate decisions in an effort to determine whether we could discern from the cases a single formula for calculating punitive damages . . . . Frankly, we are unable to find that formula. Instead of making a mathematical breakthrough we discovered what everyone probably already knows: *the formula does not exist. And, we have concluded, that is properly so.*

*Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 388, 202 Cal. Rptr. 204 (1984) (emphasis added) (footnote omitted); *see also Gagnon* v. *Continental Casualty Co.*, 211 Cal. App. 3d 1598, 1604-05, 260 Cal. Rptr. 305 (1989) ("In the final analysis . . . the propriety and amount of punitive damages depends entirely upon the particular facts of a case.").

Appellate review of punitive verdicts in California is both standardless and highly deferential. The Court of Appeal has explained:

> The calculation of punitive damages involves, . . . "a fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendants," and in this regard juries have a wide discretion in determining what is proper . . . . "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts . . . . " The more reprehensible the act, the greater the appropriate punishment.

*Downey Savings & Loan Ass'n* v. *The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 486 U.S. 1036 (1988) (citations omitted). Thus, on appeal, "[a]ll presumptions favor the correctness of the verdict and judgment," *Devlin*, 155 Cal. App. 3d, at 388, and a punitive damage award will not be disturbed unless "the entire record viewed most favorably to the judgment indicates the award was rendered as a result of passion and prejudice." *Walker* v. *Signal Companies Inc.*, 84 Cal. App. 3d 982, 997, 149 Cal. Rptr. 119 (1978).

The impact of this wholly unlimited and "fluid process" of punishment is, as this Court has recognized, manifestly "unpredictable and potentially substantial." *Electrical Workers* v. *Foust*, 442 U.S. 42, 50 (1979); *see also Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused"); *City of Newport*

v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) ("the impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial"); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83, 84 (1971) (Marshall, J., dissenting) ("the essence of [unlimited] discretion is unpredictability and uncertainty" and it "allows juries to penalize heavily the unorthodox and the unpopular and exact little from others").

California juries have imposed punitive damages in radically varying amounts for the same kind of conduct—tortious interference with commerical relationships—involved in this case. *See, e.g., Shamblin* v. *Berge*, 166 Cal. App. 3d 118, 212 Cal. Rptr. 313 (1985) (affirming $2,500 punitive damage award against real estate agents for tortious interference with a contractual relationship of real estate developer); *Shapoff* v. *Scull*, 222 Cal. App. 3d 1457, 272 Cal. Rptr. 480 (1990) (affirming a $300,000 punitive damage award against three defendants for intentional interference with contractual relations in connection with real estate development transaction); *Ramona Manor Convalescent Hospital* v. *Care Enterprises*, 177 Cal. App. 3d 1120, 225 Cal. Rptr. 120 (1986) (reversing $2,500,000 punitive damage award for tortious interference in connection with real estate lease dispute because, *inter alia*, the award was "unsupported by the verdict"); *Greenwood & Co. Real Estate* v. *C-D Investment Co.*, Nos. C 523-923, C 560-824 (Super. Ct., Los Angeles Co., Cal. Mar. 5, 1990) ($30,000,000 punitive damage verdict for tortious interference and tortious conspiracy in connection with breach of an oral real estate broker's agreement) (notice of appeal filed).[7]

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[7] In cases involving the related contract-based tort of "breach

The punitive damage systems of other jurisdictions likewise produce random and wholly unpredictable verdicts. For example, in *Eichenseer* v. *Reserve Life Insurance Co.*, 881 F.2d 1355 (5th Cir. 1989), *stay granted*, 110 S. Ct. 1468 (1990), *cert. pending* (89-1303), Judge Jones "review[ed] the range of punitive damages that have been awarded under Mississippi's bad faith refusal [to pay an insurance claim] law," 894 F.2d 1414, 1420-21 (5th Cir. 1990) (dissenting from denial of rehearing *en banc*), and found "a nearly hundred fold variation in the range of punishments assessed." *Id.* Judge Jones concluded that this "punishment without moorings," *id.*, at 1421, "mocks our notions of fundamental fairness embodied in the Due Process Clause . . . . " *Id.*, at 1415. *See also General American Life Insurance Co.* v. *Simmons*, 562 So. 2d 140, 151 (Ala. 1989) (Houston, J., concurring) (criticizing the procedural defects of the Alabama punitive damage system because "for the same conduct, within a five-year period, under the same jury instruction, one jury punishes one insurance company and its special agent in the amount of $21,130.86, and another jury punishes another insurance company and its special agent in the amount of $2,490,000"), *cert. pending* (No. 90-73).

The Petition should be granted so that this Court can finally resolve the question whether a system that imposes completely unpredictable punishments rang-

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of the convenant of good faith and fair dealing," the California appellate courts have affirmed awards ranging from $150,000, *Miller* v. *Elite Ins. Co.*, 100 Cal. App. 3d 739, 161 Cal. Rptr. 322 (1980), to $15,000,000. *See Eaton Corp.* v. *PKL Cos.*, *cert. denied*, 109 S. Ct. 1933 (1989) (Court of Appeal's opinion unpublished).

ing up to tens of millions of dollars for deviation from undefined or vaguely defined standards comports with the Due Process Clause. Indeed, this Court should consider why due process is not violated by the imposition of any punitive damages in the absence of an established "range of penalties as to which responsible officials had deliberated and then agreed." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring). No "responsible officials" established a range of penalties in this case. Moreover, as Justice Brennan, joined by Justice Marshall, noted in *Browning-Ferris*, "even where a statute sets a range of possible civil damages . . . the Due Process Clause forbids damages awards that are 'grossly excessive.'" *Id., quoting Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909). The award in this case is clearly unconstitutional under the standard articulated by Justice Brennan.

A criminal fine imposed by a jury against petitioners in the absence of any statutory limits would surely be forbidden by the Due Process Clause. *See United States* v. *Batchelder*, 442 U.S. 114, 123 (1979) ("vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"). In administering punishment in criminal cases, there is simply no credible argument against the principle that the law must "fairly and clearly define . . . the punishment which can be administered." *Berra* v. *United States*, 351 U.S. 131, 139 (1956) (Black, J., dissenting). Vague penal laws not only fail to provide "fair warning," but also "impermissibly delegate[ ] basic policy matters to . . . judges . . . and juries for

resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

In California, the vagueness of the standards for imposing punitive damages is compounded by the secret system of review practiced by that State in which appellate courts revise, reinstate, modify or affirm punitive damage awards in staggering amounts in "unpublished" or "depublished" opinions.[8]

These same due process principles would prohibit the imposition of a limitless civil fine payable to the State.[9] Indeed, it seems inconceivable that this Court would uphold a statute enforced by a State that expressly left with a jury or a judge the right, after determining liability based upon an elastic standard such as "despicable conduct,"[10] or some other wholly subjective yardstick, to impose a fine solely in their discretion. *See Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966). As this Court stated in *United States* v. *Halper*, 109 S. Ct. 1892 (1989), in applying the Double Jeopardy Clause to the punitive component of an ostensibly "civil" fine, "a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.*, at 1901-02. *See Browning-Ferris*, 109 S. Ct., at 2920 n.21. Under *Halper*, punishment is constitutionally distinct from damages constituting compensation and necessarily implicates due process

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[8] *See infra* note 11 and accompanying text.

[9] Moreover, the excessiveness of any such fine seemingly would be subject to scrutiny under the Eighth Amendment. *See Browning-Ferris*, 109 S. Ct., at 2914, 2916, 2918 & 2920.

[10] *See Cal. Civ. Code* § 3294(c).

concerns quite discrete from those invoked by purely compensatory damages.

In fact, punitive "damages" is a misnomer. Such awards are state-imposed punishments that serve no compensatory function but, rather, seek to fulfill the State's retributive and deterrent objectives. *See, e.g., Dyna-Med, Inc.* v. *Fair Employment & Housing Commission*, 43 Cal. 3d 1379, 1387, 743 P.2d 1323, 241 Cal. Rptr. 67 (1987) ("Punitive damages . . . are neither equitable nor corrective; punitive damages serve but one purpose—to punish and through punishment, to deter."). Punitive damages are therefore generically in the class of criminal punishments and civil fines—society's remedies for public wrongs—and not at all within the genus "damages."

As stated by Justice O'Connor, the "grant [to a jury] of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Bankers Life*, 486 U.S., at 88 (O'Connor, J., concurring in part and concurring in the judgment). "The touchstone of due process is protection of the individual against arbitrary action of government," *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986), *quoting Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889), and it demands that juries be confined in their ability to administer punishment by the deliberative judgments of legislatures regarding: (1) the amount of punishment necessary to secure society's interests in retribution and deterrence; and (2) the standards under which the jury is to arrive at an appropriate punishment in a particular case. This question is important, implicates a broad spectrum of civil litigation in which punitive damages are available, and should be decided in this case.

**B. Only this Court Can Resolve the Question Presented in the Petition**

The fundamental due process defects in the punitive damage system discussed above can only be cured by a decision of this Court. The Supreme Court of California has turned a deaf ear to repeated constitutional objections to that system, as have the California lower courts. *See, e.g., Farajpour* v. *University of Southern California*, 221 Cal. App. 3d 19, 39-40, 270 Cal. Rptr. 356 (1990) (citing decisions of "the California Supreme Court . . . summarily rejecting constitutional challenges" to punitive damages and concluding that such challenges "cannot properly be addressed to any court subordinate to the California Supreme Court") (subsequently ordered to be depublished).

As noted above, such is the antipathy of the California courts towards these important constitutional issues that they routinely affirm seven- and eight-digit punitive damage awards in "unpublished" opinions that simultaneously perpetuate and shield from scrutiny the capriciousness of the punitive damage system. For example, after noting that the due process question had been left open in *Browning-Ferris*, on August 30, 1989, a California Court of Appeal rejected a federal due process challenge to a $2,500,000 punitive damage award, stating that although the "thrust of defendants' contentions is not without some persuasive force," "we think it appropriate to rely on *Downey Savings* [*and Loan Association* v. *The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 486 U.S. 1036 (1988)] pending further action by the United States

or California Supreme Courts."[11] The California legislature also has declined to intervene, making only minor adjustments to California's law of punitive damages since this Court's 1986 decision in *Aetna*.[12]

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[11] *George* v. *International Society for Krishna Consciousness of California*, 213 Cal. App. 3d 729, 798, 262 Cal. Rptr. 217 (1989) (subsequently ordered to be depublished), *stay granted*, 110 S. Ct. 1804 (1990), *cert. pending* (No. 89-1399); *see also Eaton Corp.* v. *The PKL Cos.*, *cert. denied*, 109 S. Ct. 1933 (1989) ($15,000,000 punitive damage award affirmed in an unpublished opinion); *Metromedia, Inc.* v. *April Enterprises, Inc.*, *cert. denied*, 109 S. Ct. 3242 (1989) ($14,000,000 punitive damage award affirmed in an unpublished opinion); *Security Pacific National Bank* v. *Williams*, 213 Cal. App. 3d 927, 262 Cal. Rptr. 260 (1989) (affirming $2,500,000 punitive damage award) (subsequently ordered not to be published); *Leonardini* v. *Shell Oil Co.*, 216 Cal. App. 3d 547, 264 Cal. Rptr. 883 (1989) (affirming $5,000,000 punitive damage award) (punitive damage portion of opinion ordered to be depublished), *cert. denied*, October 15, 1990 (No. 89-2029); *The Ohio Casualty Insurance Co.* v. *G. Amador Corp.*, *cert. dism'd* (No. 89-1986) (affirming $10,000,000 punitive damage award in an unpublished opinion). Because such decisions are "unpublished," it is entirely possible that there are other similar awards affirmed by the California Court of Appeal that are inaccessible to the public and the bar because of California's peculiar official censorship policy. As illustrated by cases like *George* v. *International Society for Krishna Consciousness*, this censorship policy is sometimes enforced by the Supreme Court of California by overriding a Court of Appeal decision ordering its opinion to be published. Under Rule 977 of the California Rules of Court, such unpublished or depublished opinions generally may not even be cited or relied upon by litigants. This practice screens from public scrutiny the effects of the punitive damage system and aggravates the *ad hoc* and utterly unpredictable nature of punitive damages.

[12] In 1987, the California legislature enacted a comprehensive "tort reform" package, which, *inter alia*, amended in a number of respects *Cal. Civ. Code* § 3294, the statute pursuant to which punitive damages were and continue to be generally authorized in civil actions *without limit*. Prior to its amendment, § 3294 allowed punitive damages in unlimited amounts to be imposed where a preponderance of the evidence showed that the defendant had "been guilty of oppression, fraud, or malice." As amended, it now requires proof "by clear and convincing evidence." The definitions of "malice" and "oppression" also were re-

The courts of the other States continue to enter and affirm punitive damage awards as if this Court's concerns had never been articulated. As expressed by a Maryland appellate court on June 9, 1989, after citing cases such as *Day* v. *Woodworth*, 54 U.S. (13 How.) 363 (1851), for this Court's "approval" of the punitive damage system, "[w]hat the Supreme Court has declared constitutional we may not put asunder. . . ." *Potomac Electric Power Co.* v. *Smith*, 79 Md. App. 591, 558 A.2d 768, 792 (Md. Ct. Spec. App. 1989) (affirming $7,500,000 punitive damage award). In *General American Life Insurance Co.* v. *Simmons*, 562 So. 2d 140 (Ala. 1989), *stay granted*, June 4, 1990 (A-845) (Kennedy, Circuit Justice), *cert. pending* (No. 90-73), the Supreme Court of Alabama affirmed a $600,000 punitive damage award, disposing of Due Process Clause challenges to the award on the basis of its own previous decisions in which it "has consistently rejected the same arguments . . . and has upheld the constitutionality of punitive damages." Id., at 149.[13]

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vised to require that the conduct be found "despicable" in certain circumstances. More broadly, the 1987 legislation provided that evidence of a defendant's financial condition not be admitted prior to a finding of liability and a finding of "malice, oppression or fraud" warranting punitive damages, and further provided that complaints for punitive damages not state an amount. *See Cal. Civ. Code* § 3295 (Deering Supp. 1990).

[13] Similarly, on October 4, 1989, an Indiana appellate court, affirming a $1,000,000 punitive damage award for false imprisonment and malicious prosecution, observed:

> [P]unitive damages have long been recognized as comporting with the Fundamental Fairness Doctrine of the due process clause. *Missouri Pacific and R. Co.* v. *Humes* (1885), 115 U.S. 512. It is true . . . that Justice O'Connor recently commented in a recent opinion about punitive damages and due

The federal courts of appeals likewise seem to be in a state of paralysis in dealing with the constitutional implications of punitive damages. This paralysis manifests itself in two ways. First, courts of appeals cling to their own precedents, decided decades before serious federal constitutional objections to arbitrary and excessive punitive damage awards were advanced in and legitimated by this Court in *Aetna*, *Bankers Life*, and *Browning Ferris*. Thus, in *Racich* v. *Celotex Corp.*, 887 F.2d 393, 399 (2d Cir. 1989), the Second Circuit could not "write upon a clean slate" on the due process issue because a twenty-two year-old de-

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process protections. *See Bankers Life, supra.* However, the Supreme Court in that case and in a subsequent decision explicitly refused to consider the question. *See Browning-Ferris, supra.* Thus, we cannot conclude that the punitive damage award here violated the fourteenth amendment of the United States Constitution.

*Lazarus Department Store* v. *Sutherlin*, 544 N.E.2d 513, 529-30 (Ind. App. 1989); *see also Olson* v. *Walker*, 781 P.2d 1015, 1022-23 (Ariz. App. 1989) ("neither the U.S. Supreme Court nor any Arizona court has decided whether more stringent procedures are necessary in private civil punitive damages actions to satisfy due process .... The punitive damage award does not violate due process."); *Stoner* v. *Nash Finch, Inc.*, 446 N.W.2d 747, 755-56 (N.D. 1989) (discussing *Browning-Ferris* and rejecting due process challenges to punitive damages because "courts which have recently addressed arguments ... that various punitive damages schemes are unconstitutionally vague in defining conduct giving rise to liability and in providing standards for assessing the amount, have found no due process violation"); *Douglas* v. *Bank of New England/Old Colony, N.A.*, 566 A.2d 939, 942 (R.I. 1989) (due process challenge to punitive damages is "not persuasive in light of the fact that there is no showing that the trial justice's award ... constituted an abuse of ... the due process clause of the Federal Constitution .... *See Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.* ...,") (affirming $225,000 punitive damage award).

cision of that court had considered and *implicitly* rejected an apparently similar claim.[14]

Second, no Court of Appeals appears to want to be the first to decide these substantial due process questions. As the Fifth Circuit has put it, "no circuit court has yet ruled on this issue" and "we need not become the first court to resolve this challenging inquiry." *Eichenseer* v. *Reserve Life Insurance Co.*, 881 F.2d 1355, 1365 (5th Cir. 1989) (affirming $500,000 punitive damage award), *stay granted*, 110 S. Ct. 1468 (1990), *cert. pending* (No. 89-1303); *see also Davis* v. *Merrill Lynch, Pierce, Fenner & Smith*, 906 F.2d 1206, 1226 (8th Cir. 1990) ("Assuming without deciding that punitive damages awards must comply with due process," and affirming $2,000,000 punitive damage award). The Ninth Circuit brushed off a due process challenge with the observation that, "[u]nder *current* constitutional standards, the jury's discretion regarding punitive damages is not subject to strict fetters. 'Jury discretion over the amounts awarded is limited only by the gentle rule that [punitive damages] not be excessive.' "[15] *See also The Post Office* v. *Portec, Inc.*, Nos. 88-2836, 89-1034 (10th Cir. Aug. 27, 1990), slip op., at 13 ("Defendant points to no Supreme Court action that requires us to question our prior holding" that the "Colorado [punitive damage] statute did not violate the due process clause[ ] of the federal . . . constitution") (remitting $1,500,000 punitive damage award to $500,000).

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[14] *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 835, 841-42 (2d Cir. 1967).

[15] *Kraus* v. *Santa Fe Southern Pacific Corp.*, 878 F.2d 1193, 1200 (9th Cir. 1989) (emphasis added) (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)), *cert. dism'd*, 110 S. Ct. 1329 (1990).

The federal district courts are in comparable disarray. On February 1, 1990, a federal district court—after full briefing of these constitutional issues in the post-trial motions—entered judgment on a $30,000,000 punitive damage award without any reference to these issues other than the statement that "[t]his court has carefully considered each post judgment motion . . . ." *Brooks* v. *Hilton Casinos, Inc.*, No. CV S-84-436 (RDF) (D. Nev. Feb. 1, 1990); *see also Advanced Medical, Inc.* v. *Arden Medical Systems, Inc.*, Civ. Action No. 87-3059 (E.D. Pa. Sept. 6, 1990), slip op., at 10 (Defendants' "contention . . . that an award of punitive damages acts as a deprivation of their property without due process of law . . . provides an interesting academic argument. It is not, however, the long line of punitive damages law which this court must follow.") (denying post-trial motions challenging jury verdict of $7,150,000 in punitive damages for "tortious interference with existing contractual relationships").

Other federal district courts have expressly found *Browning-Ferris* to be dispositive authority against applying the Due Process Clause to punitive damage awards. For example, in *Ay You Man* v. *Raymark Industries*, Nos. 87-14524, 87-14470 (D. Hawaii Nov. 16, 1989), the District Court rejected a broad due process challenge to the standardless imposition of punitive damages, stating that it did "not find that the [United States] Supreme Court has given any indication that punitive damages are unconstitutional as a matter of law and this court will not extract such a doctrine from defendants' inaccurate interpretation

of Court dicta." Slip op., at 4. Similar post-*Browning-Ferris* federal cases abound.[16]

Perhaps the Second Circuit has captured as well as possible the reluctance of the lower state and federal courts to march into this new constitutional terrain.

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[16] *See Falk* v. *McNamara*, No. 88 C 7293 (N.D. Ill. Mar. 30, 1990), slip op., at 4 (although "*Browning-Ferris* . . . declined to address the issue herein, the Supreme Court decisions in the area imply that punitive damage awards do not violate due process as a matter of law"); *Germanio* v. *The Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297, 1304 (D.N.J. 1990) ("It will take a less skeptical and more adventurous court than this one to conclude that the Fourteenth Amendment requires higher standards of procedural protection for civil defendants in [punitive damage] cases than those that have obtained for decades, if not centuries."); *Gray* v. *Armstrong World Industries*, No. 88-2509 (D.D.C. Feb. 22, 1990), slip op., at 6 (noting a lack of "substantial supporting authority" for the argument that "punitive damages are per se unconstitutional" and suggesting that this Court rejected "similar constitutional challenges" in *Browning-Ferris)*; *In re Joint Eastern and Southern District Asbestos Litigation*, No. 87 Civ. 4483 (E.D. & S.D.N.Y. Oct. 24, 1989), slip op., at 2 ("Celotex's challenges to the punitive damages award are also unavailing . . . . [T]he constitutionality of punitive damages awards has recently been affirmed" in *Browning-Ferris)*; *Guarino* v. *Armstrong World Industries, Inc.*, No. 88-1087 (S.D. Fla. Oct. 13, 1989), slip op., at 4 & n.3 (rejecting due process challenges to punitive damages because, *inter alia*, "the Supreme Court has long held state regulation in the economic realm to be immune from due process invalidation, where the state has presented a valid basis for its regulation"); *Hart* v. *Armstrong Cork Co.*, No. S79-0033 (S.D. Miss. Sept. 13, 1989) (consolidated cases), slip op., at 9 ("The defendant's challenge [to Mississippi's punitive damage standards] appears particularly unpersuasive in light of the United States Supreme Court's decision in *Smith* v. *Wade*, 461 U.S. 30 (1983)."); *Juzwin* v. *Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235 (D.N.J. 1989) (lower courts are "powerless to fashion a remedy" that will protect the due process rights of defendants subject to multiple punitive awards until "there is uniformity either through [United States] Supreme Court decision or national legislation"); *Leonen* v. *Johns-Manville Corp.*, 717 F. Supp. 272, 280 (D.N.J. 1989) ("the United States Supreme Court's decision in *Smith* v. *Wade* . . . puts to rest any question regarding the vagueness" of punitive damage standards).

More than three months after this Court's decision in *Browning-Ferris*, that court refused to tread into what is so obviously this Court's domain:

> [W]e are here asked to hold, in effect, that the common-law standards applied by the [state] courts . . . for imposition of punitive damages are unconstitutional . . . . Under all the circumstances, we believe that such a step, if it is to be taken . . . is best left for . . . higher judicial authority.

*Racich* v. *Celotex Corp.*, 887 F.2d, at 399. *Accord Simpson* v. *Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir. 1990), *cert. dism'd* (No. 90-121).

Based upon the foregoing, petitioners respectfully submit that the need for this Court's intervention is manifest.

## CONCLUSION

The California courts have firmly rejected petitioners' arguments that the United States Constitution regulates the manner in which punitive damages may be imposed. This Court's resolution of the question presented by petitioners will have a substantial impact on matters that are arising daily in the courts of this Nation and are dramatically changing the character of litigation conducted throughout the United States. Petitioners respectfully pray that the Petition be granted and that this question be set for plenary consideration.

October 16, 1990

Respectfully submitted,

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# APPENDIX

## APPENDIX A

**NOT TO BE PUBLISHED**

**IN THE COURT OF APPEAL**
**OF THE STATE OF CALIFORNIA**
**FOURTH APPELLATE DISTRICT**
**DIVISION THREE**

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**G006654**
**(Super. Ct. No. 416196)**

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MGW, INC.,
*Plaintiff and Appellant,*
v.
FREDRICKS DEVELOPMENT CORPORATION et al.,
*Defendants and Appellants.*

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**COURT OF APPEAL-4TH DIST. DIV. 3**
**FILED**
**APR 30 1990**
**Deputy Clerk**

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## OPINION

APPEAL from a judgment of the Superior Court of Orange County, Samuel B. Taylor, Jr., Judge. Affirmed in part and reversed in part.

Perez & McNabb and Richard L. Perez for Plaintiff and Appellant.

Irell & Manella, Scott D. Baskin, Andra Barmash Greene, Gibson, Dunn & Crutcher, John J. Swenson, Rob-

ert F. Serio, Higgs, Fletcher & Mack, Woodrow D. Smith, John M. Morris, Melvin King, Drummy, Garrett, King & Harrison, Howard F. Harrison and Kathleen Carothers Paone for Defendants and Appellants.

* * *

A jury awarded plaintiff real estate broker damages against defendant real estate developers for interference with prospective economic advantage and conspiracy after defendant developers refused to pay plaintiff a commission pursuant to an oral broker's agreement. Defendant developers appeal from the judgment, and plaintiff broker appeals from orders of dismissal and nonsuit as to other defendants. We reverse as to defendant Pacific Lighting, but affirm the judgment in all other respects.

## FACTS

Plaintiff MGW is a commercial real estate brokerage and investment firm owned and operated by Malcolm Waitt, Jr., a licensed real estate broker. Waitt is MGW's only employee.

Defendant Fredricks Development Corporation is a real estate developer involved in the construction of large-scale residential tracts. Fredricks is a wholly-owned subsidiary of Pacific Lighting Corporation.

In 1982 Fredricks made known to Waitt and other local brokers that it was interested in acquiring a large residential project along the I-15 corridor in the southern Orange County or northern San Diego County area. Waitt was told that if he brought in an opportunity Fredricks undertook and was not paid a broker's fee by the seller, Fredricks would see he was fairly compensated. This was Fredricks' standard arrangement, and on at least one previous occasion Waitt was paid for his efforts under this arrangement. Waitt had no written broker's contract with Fredricks.

On or about February 14, 1983, Waitt read a newspaper article which said that Home Capital, which was in the business of financing developments, had bought out its prior partner and was looking for an experienced developer and joint venturer to help build out a 1500-acre mixed residential/commercial project known as Rancho Carmel.[1] The project was located along the I-15 corridor in northern San Diego County. Waitt, believing this was just the opportunity Fredricks was looking for, called Home Capital and told them Fredricks might be interested in the project. Home Capital told Waitt that if they struck a deal with Fredricks they would not pay a broker's fee and he would have to look to Fredricks for any commission.

Waitt showed the article to Fredricks. They told him that neither they nor Pacific Lighting were aware of the Rancho Carmel opportunity, and on being advised Home Capital would not pay a broker's commission, Fredricks assured Waitt that if they went ahead with the deal he would be fairly compensated.

On March 21, 1983, Fredricks, Home Capital, and Dunn Properties Corporation, a wholly-owned subsidiary of Pacific Lighting which builds out commercial tracts, signed a letter of intent to enter into a joint venture to build the Rancho Carmel project. The purpose of the letter was to tie up the property for a period of time in order to allow Fredricks and Dunn to determine the project's feasibility. One of its provisions was that: "[Dunn and Fredricks] and Home [Capital] each hereby represent to one another that no broker or finders fee will be payable as a result of D & F and Home entering into the proposed venture and each indemnifies the other against any such broker or finders fee." Dunn became involved because Fredricks could not handle the commercial end of the project.

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[1] Humboldt Financial Services Corporation also owned a small part of the project.

Waitt frequently asked about the project and was led to believe the deal was progressing smoothly and that Fredricks intended to compensate him. He was never told he would not be paid a commission.

The joint venture interest was ultimately purchased on behalf of Fredricks and Dunn in the name of Pacific Real Estate Projects (PREP), another wholly-owned subsidiary of Pacific Lighting. Fredricks, however, refused to pay Waitt a broker's commission, claiming the Pacific Lighting corporations knew of the opportunity before Waitt brought the newspaper clipping to them. Waitt was told that in late 1982 there had been rumors the Rancho Carmel project might soon become available, that Dunn had inquired (through a different broker) whether Home Capital would sell off just the commercial use, that Home Capital said it was unwilling to discuss sale of the project until it bought out its joint venturer, and that Home Capital was unwilling to sell off just the commercial part of the project since it viewed the entire development as an integrated plan. Dunn, however, did not pursue the commercial part of the project at any time after it became available and before Waitt brought Fredricks the article.

Waitt filed an action for breach of oral agreement, quantum meruit, tortious breach of the covenant of good faith and fair dealing, conspiracy and tortious interference with prospective economic advantage. The complaint named Fredricks, Dunn, Pacific Lighting, PREP, Home Capital and Humboldt as defendants.

At trial the court dismissed all of MGW's contractual claims on the ground they were unenforceable under the statute of frauds. A nonsuit was granted in favor of Home Capital and Humboldt, and a nonsuit was granted to PREP on the interference with prospective advantage claim. The jury returned a verdict of $558,000 in damages against Fredricks, Pacific Lighting, Dunn and PREP, and $2 million in punitives against all defendants but PREP. Pacific

Lighting's motions for judgment notwithstanding the verdict and a new trial were granted. Fredricks, Dunn and PREP appeal from the judgment. MGW appeals from the orders of nonsuit, new trial, and judgment notwithstanding the verdict.

## DISCUSSION

### I

### Fredricks and Dunn Appeal

### A

Fredricks and Dunn argue that no cause of action can be stated for interference with prospective economic advantage when the underlying agreement violates public policy. While recognizing that *Buckaloo* v. *Johnson* (1975) 14 Cal.3d 815 holds that a broker may state a cause of action for interference with prospective economic advantage even when the agreement violates the statute of frauds (*id.* at pp. 829-830), Fredricks and Dunn argue the Supreme Court has signalled a change in this rule in its recent opinion in *Phillippe* v. *Shapell Industries* (1987) 43 Cal.3d 1247. We disagree.[2]

In *Buckaloo* the court held a purchaser may not, "with full knowledge of the economic relationship between broker and seller, intentionally induce[ ] the latter to violate the terms of the relationship and seek refuge in the unenforceability of the contract." (*Buckaloo* v. *Johnson, supra,* 14 Cal.3d at p. 827.) The court explained: "There is no

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[2] The five elements for interference with prospective economic advantage are: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. [Citations.]" (*Youst* v. *Longo* (1987) 43 Cal.3d 64, 71, fn. 6.)

public policy to be served by encouraging such devious dealings; on the contrary, such an intrusion into a protected economic relationship is precisely the conduct condemned by the traditional tort of interference with contract." (*Id.* at p. 828.) In *Phillippe* the court reemphasized its commitment to the principle that a contractual claim for a real estate commission is dependent on compliance with the statute of frauds (*Phillippe* v. *Shapell Industries, supra*, 43 Cal.3d at p. 1267), and held a broker may not avoid the statute of frauds by asserting that he reasonably relied on an oral agreement. (*Id.* at p. 1270.)

Nothing in *Phillippe* suggests that *Buckaloo* has been overruled; indeed, it cites *Buckaloo* approvingly. If Fredricks and Dunn are correct and the Supreme Court wishes to repudiate *Buckaloo*, then that is a matter for its review. Meanwhile, we are constrained to follow the law as it has been laid down by the Supreme Court. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

B

Next, Fredricks and Dunn argue the judgment must be reversed because Dunn as an agent and wholly-owned subsidiary of Pacific Lighting could not interfere with the relationship, there was no evidence Fredricks refused to pay the commission because of what Dunn told it, and there could be no conspiracy because there was no underlying tort. We disagree.

Although the arguments appear to raise issues of law, on closer review it is clear they are based on the notion that there is no substantial evidence to support the jury's finding Dunn conspired or could conspire with Fredricks. In reviewing a claim of insufficiency of the evidence we " 'must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion.

Every substantial conflict in the testimony is . . . to be resolved in favor of the finding.' [Citation.]" (*County of Mariposa* v. *Yosemite West Associates* (1988) 202 Cal.App.3d 791, 807; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 282, p. 293.)

Fredricks and Dunn initially assert Dunn could not interfere with MGW's prospective economic relationship because it was not a malicious interloper or stranger to the disrupted relationship. Relying on selected language in *Buckaloo* v. *Johnson, supra,* 14 Cal.3d at p. 827 and *Zimmerman* v. *Bank of America* (1961) 191 Cal.App.2d 55, 61, they contend Dunn, as a wholly-owned subsidiary in the Pacific Lighting family, could not interfere with a relationship to which it was a party. The argument is subtly deceptive. Although Fredricks and Dunn are subsidiaries of Pacific Lighting, that does not mean they are "the same party" and cannot interfere with the other's economic relationships. Indeed, evidence adduced at trial was that the two subsidiaries worked independently in different parts of the development world: Fredricks was involved in the residential arena while Dunn was involved in the commercial; the two were competitors and had never, up until Rancho Carmel, worked on a project together; and Pacific Lighting does not guarantee the obligations of its subsidiaries. From this evidence the jury could reasonably conclude Fredricks and Dunn were independent entities.

In that same vein, Fredricks and Dunn contend Dunn could not interfere because it was Fredricks' agent. While the complaint alleged the defendants were agents of each other, the evidence was to the contrary. Moreover, MGW's motion to amend the complaint to conform to proof and delete the allegations of agency was properly granted. (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 1137, pp. 551-552.)

Next, they argue MGW disproved causation because the evidence showed Fredricks decided not to pay the com-

mission for reasons other than what Dunn said. But the jury concluded that it was precisely because of what Dunn said that the commission was not paid. There may be evidence which could be interpreted differently, but we must resolve all conflicts in the evidence in favor of the finding.

Finally, they argue that there could be no actionable conspiracy because there was no tort. (*Manor Investment Co.* v. *F. W. Woolworth Co.* (1984) 159 Cal.App.3d 586, 595.) Here, of course, there was an actionable wrong and thus there could be a conspiracy.

C

Finally, Fredricks and Dunn contend the trial court improperly instructed the jury.

They argue the court erred in failing to define who constituted an employee or agent of a party, and improperly used the term parties, rather than interloper, when describing the one who interferes. This argument cannot be sustained as no request for a proper instruction was made below. (Null v. *City of Los Angeles*, (1988) 206 Cal.App.3d 1528, 1535.)

Next they argue the court improperly instructed the jury that, "a broker may have a reasonable expectation of compensation when he is the procuring cause of a buyer's purchase, even though the underlying oral agreement, if any, with the buyer is unenforceable. [¶] Now, it is for you the jury to determine the circumstances and whether or not the plaintiff's expectation was reasonable in the light of those circumstances." Under *Phillippe*, it is clear a broker cannot have a reasonable expectation of payment when the agreement is oral. (*Phillippe* v. *Shapell Industries, supra*, 43 Cal.3d at p. 1262.) But an element of the tort is the probability of future economic benefit. (*Buckaloo* v. *Johnson, supra*, 14 Cal.3d at p. 827.) The instruction given here was the trial court's effort to incorporate that

element in its instructions. Perhaps the wording could have been better, but the instruction did not reduce plaintiff's burden nor unreasonably focus the jury's inquiry on the subjective intent of MGW. The instruction was proper.

## II

## PREP Appeal

PREP was held liable on the theory it conspired to prevent MGW from receiving a broker's commission. It asserts the judgment must be reversed because Pacific Lighting cannot conspire with its wholly-owned subsidiaries, the judgment is not supported by substantial evidence, and MGW "has disproved interference." We disagree.

In support of its argument that a parent corporation cannot conspire with its wholly-owned subsidiaries, PREP relies on *Copperweld Corp.* v. *Independence Tube Corp.* (1984) 467 U.S. 752. In that case, the issue was whether the coordinated acts of a parent corporation and a wholly-owned subsidiary could constitute a "combination or conspiracy" under section 1 of the Sherman Antitrust Act. (*Id.* at p. 759.) In holding it could not, the United States Supreme Court noted that "The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. . . . For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." (*Id.* at p. 769; see also *Klein* v. *Oakland Raiders, Ltd.* (1989) 211 Cal.App.3d 67, 76.)

*Copperweld*'s analysis, which is well suited to the antitrust field, is ill suited to the civil conspiracy arena where the focus is not on whether there is a "combination" of economic power, but on whether an individual has joined with another to perpetrate a civil wrong. No California

case has applied *Copperweld* or its reasoning in this context (*MacManus* v. *A. E. Realty Partners* (1987) 195 Cal.App.3d 1106, 1110; see also *Pinhas* v. *Summit Health, Ltd.* (9th Cir. 1989) 894 F.2d 1024, 1033), and we are unwilling to do so when the evidence showed PREP was a separate entity wholly responsible for its own obligations. It purchased the project in its own name and assumed a large debt without a guarantee by its parent corporation. It participated, through its officers, in the decision not to pay MGW a commission. Under the facts adduced at trial, there is substantial evidence to support the judgment and to prove PREP interfered with MGW's economic relationship with Fredricks.

## III

## MGW Appeal

### A

MGW asserts the trial court erred in granting Pacific Lighting's motion for judgment notwithstanding the verdict. We agree.

" 'A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.' [Citation.]" (*Hauter* v. *Zogarts* (1975) 14 Cal.3d 104, 110.)

The issue, then, is whether there is any substantial evidence which supports the jury's conclusion Pacific Lighting interfered, or conspired to interfere with, MGW's prospective economic advantage. Jim Hunter testified he was an employee of Pacific Lighting and was responsible for supervising its real estate subsidiaries, including Fredricks and Dunn. He was chairman of the board of the subsi-

diaries and was responsible for overseeing their real estate activities and sales. Hunter was involved in the decision as to whether MGW should be paid and he counseled against paying a commission on the ground the Rancho Carmel project was previously known to the Pacific Lighting group. From this testimony, the jury could reasonably conclude that Pacific Lighting participated in the decision to refuse to pay the real estate commission, and thus the motion for judgment notwithstanding the verdict should have been denied.

MGW also contends the trial court improperly granted Pacific Lighting's motion for new trial. Under Code of Civil Procedure section 657, an order granting a new trial "shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order . . . ." Although Pacific Lighting offers several reasons why the motion was properly granted, none have merit.

Pacific Lighting argues the court failed to properly instruct the jury as to the prerequisites for awarding punitive damages. But Pacific Lighting never asked for such instruction and thus any error on this point was waived. (*Null* v. *City of Los Angeles, supra,* 206 Cal.App.3d at p. 1535.) It then argues that, as a matter of law, a parent corporation cannot conspire with its wholly-owned subsidiaries. We rejected that argument above, however, when we affirmed the judgment against PREP for conspiracy to interfere. (*MacManus* v. *A. E. Realty Partners, supra,* 195 Cal.App.3d at p. 1110.) Next, Pacific Lighting argues the judgment was not supported by the evidence. That argument is meritless because Hunter's testimony established that Pacific Lighting participated in the decision to not pay MGW its commission. (See *Hauter* v. *Zogarts, supra,* 14 Cal.3d at p. 110.) Pacific Lighting contends the jury failed to reach a consensus on the issue of damages in violation of the "nine-juror rule," but it fails to demonstrate that less than nine jurors made the required find-

ing here. (*Juarez v. Superior Court* (1982) 31 Cal.3d 759, 766; *Earl* v. *Times-Mirror Co.* (1921) 185 Cal. 165, 182-186.) Finally, it argues the award of punitive damages is supported by insufficient evidence, and punitive damages are unconstitutional. However, there is sufficient evidence in the record to support the award, and punitive damages are constitutional under the Eighth Amendment (*Browning-Ferris* v. *Kelco Disposal* (1989) 109 S.Ct. 2909, 2912), and the due process provisions of the Fourteenth Amendment (*Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, 66, fn. 13, *Zhadan* v. *Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 501-502; but see *Pacific Mut. Life Ins. Co.* v. *Haslip* (Ala. 1989) 553 So.2d 537, 543, cert. granted April 2, 1990, 1990 U.S.L.W. 15078, No. 89-1279).

**B**

Home Capital and Humboldt, sellers of the property, escaped liability when the trial court granted their motion for nonsuit. MGW argues the motion should not have been granted because the evidence demonstrated the sellers participated in the conspiracy to interfere with payment of the commission. We disagree.

"A motion for nonsuit is tantamount to a demurrer to the evidence and presents a question of law: whether the evidence offered in support of the plaintiffs' case could justify a judgment in the plaintiffs' favor. [Citation.] In reviewing the propriety of the trial court's order granting the . . . motion . . ., we must accept plaintiffs' evidence as true . . . and resolve all conflicts and reasonable inferences in their favor. [Citations.]" (*Lussier* v. *San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 98.)

Waitt was told at the outset that Home Capital would not pay him a broker's fee on sale of the project and that he would have to look to the buyer for any commission. While Home Capital entered into a letter of intent with Fredricks which provided it would not pay any broker's

commission, that was but a restatement of its consistent position that the buyer would be responsible for any commission. There was no evidence Home Capital signed the letter of intent to help Fredricks avoid paying a commission. Indeed, there was testimony Home Capital did not know Fredricks would refuse to pay a commission for locating the project. Since there was no evidence Home Capital and Humboldt conspired to interfere with MGW's prospective economic advantage, the motion was correctly granted.

C

The trial court granted judgment on the pleadings on the contract causes of action finding they were barred by the statute of frauds. (Civ. Code, § 1624.) MGW contends the statute of frauds does not apply because it was asked to locate a "business opportunity" and not real property. The contention is without merit.

A business opportunity is "the sale or lease of the business and goodwill of an existing business enterprise or opportunity." (Bus. & Prof. Code, § 10030.) However one may try to portray the "project" Fredricks was seeking when it told Waitt and other local brokers it was interested in acquiring a large residential project, Fredricks was not seeking a "business opportunity" as that term is defined in the Business and Professions Code. Waitt was asked to locate real property on which Fredricks could build homes. Since the basic purpose of the agreement was to locate real estate, the statute of frauds was applicable and required the broker's agreement to be in writing. (See *Phillippe* v. *Shapell Industries, supra*, 43 Cal.3d at p. 1255; *Tenzer* v. *Superscope, Inc.* (1985) 39 Cal.3d 18, 25-27.) Thus, the trial court properly granted the motion for judgment on the pleadings as to the contract causes of action. (See *Beck* v. *American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1565.)

## DISPOSITION

The judgment is reversed as to Pacific Lighting, and is affirmed in all other respects. MGW to recover costs from Fredricks, Dunn, PREP and Pacific Lighting; Home and Humboldt to recover costs from MGW.

*NOT TO BE PUBLISHED*

SCOVILLE, J.*

WE CONCUR:

SONENSHINE, Acting P. J.

WALLIN, J.

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* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

## APPENDIX B

**COURT OF APPEAL - STATE OF CALIFORNIA**
**FOURTH APPELLATE DISTRICT**
**Division Three**

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**G006654**
**Orange County No. 416196**

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MGW, INC.

v.

FREDRICKS DEVELOPMENT CORPORATION

COURT OF APPEAL-4TH DIST. DIV. 3
FILED

MAY 2 1990
Deputy Clerk

THE COURT:

The petition for rehearing is DENIED.

/s/ SCOVILLE, P.J.
Presiding Justice

We Concur:

/s/ SONENSHINE, J.
Justice

/s/ WALLIN, J.
Justice

cc: Orange County Clerk
All Counsel

## APPENDIX C

## ORDER DENYING REVIEW

## AFTER JUDGMENT BY THE COURT OF APPEAL

**Fourth Appellate District, Division Three, No. G006654**
**S015966**
**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**IN BANK**

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**SUPREME COURT**
**FILED**

**JUL 18 1990**

**Robert Wendorf Clark**

**DEPUTY**

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MGW INCORPORATED,

*Appellant*

*v.*

FREDRICKS DEVELOPMENT CORPORATION *Et Al.*,

*Appellants*

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Petitions for review DENIED.

/s/ PANELLI
*Acting* Chief Justice

## APPENDIX D

**IN THE COURT OF APPEALS**

**FOURTH APPELLATE DISTRICT**

**STATE OF CALIFORNIA**

**DIVISION THREE**

MGW, INC.,
*Plaintiff and Appellant,*

vs.

PACIFIC LIGHTING CORPORATION, *et al.*,
*Defendant and Respondent.*

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**APPEAL FROM THE SUPERIOR COURT**
**OF ORANGE COUNTY**
**HONORABLE SAMUEL B. TAYLOR, JR.**
**Superior Court Case No. 416196**

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**BRIEF OF RESPONDENT**
**PACIFIC LIGHTING CORPORATION**

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*PACIFIC LIGHTING CORPORATION*

* * *

endowed with power to control corporate policy. Notwithstanding MGW's assertions to the contrary, none of which are supported by citation to the record, Hunter never testified, nor was he asked about, his ability to formulate

Pacific Lighting policy. Although MGW places great weight on Hunter's statement that "by and large I have always been an employee of Pacific Lighting", as already discussed, this statement was made in a colloquial manner after a specific factual description of Hunter's employment history, which indicated a long affiliation with Pacific Lighting *subsidiaries* only. In fact, the statement directly conflicted with all other factual statements regarding Hunter's employment history, and as recognized by the trial court, "it is clear this statement was a characterization, not a statement of actual fact." Order, p. 4.

In fact, even assuming, *arguendo*, that Hunter's statement regarding his status as a Pacific Lighting employee was true, there was no evidence presented as to his job title, the scope of his employment or authority, or the nature of his duties or responsibilities with Pacific Lighting. Without such additional evidence, it was impossible for the jury to determine whether Hunter was, indeed, an officer, director, or managing agent of Pacific Lighting as required under California Civil Code Section 3294(b). Thus, the trial court properly reversed the punitive damage award for lack of substantial evidence in support thereof.

**B. The Jury's Unlimited Discretion To Mete Out Punishment In The Form Of Punitive Damages Violates The Due Process Clause Of The Fourteenth Amendment And The Excessivc Fines Clause Of The Eighth Amendment.**

Not only was the jury's punitive damage award unsupported by the record, but it was clearly unconstitutional as well. In the past few months, the Supreme Court of the United States has made exceedingly clear its opinion that the essentially unrestrained discretion vested in juries to award "unlimited" punitive damages "may violate the due process clause" and that "the grant of wholly standardless discretion to determine the severity of [such] punishment appears inconsistent with due process." *See*

*Banker's Life & Casualty Co. v. Crenshaw*, ___ U.S. ___, 108 S.Ct. 1645, 1656, 100 L.Ed. 2d 62 (1988) (O'Connor, J. and Scalia, J. concurring). Moreover, the Court has indicated that such unfettered discretion may result in imposition of civil fines which greatly exceed the amount of fines imposed to punish comparable criminal conduct, a result which violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. 108 S.Ct. at 1651 (noting that "whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases . . . is a question of some moment and difficulty"). Although the Supreme Court has yet to definitively rule upon these issues, it has expressed the intent to resolve such questions in the context of a proper procedural challenge. This Court need not await such action, however, as the present case is one wherein the award of punitive damages clearly violates Pacific Lighting's rights under both the Due Process and Excessive Fines Clauses of the United States Constitution.

**1. The Punitive Damage Award Flies In The Face Of Fundamental Concepts Of Due Process.**

It is well-accepted in the present judicial system that the concept of "due process", as embodied in the Fourteenth Amendment to the Constitution, prohibits imposition of either civil or criminal punitive measures in the absence of clear guidelines limiting such awards.[8] In fact, the functional equivalents of modern day punitive damage awards, amercements and fines, have *always* been imposed within a system under which the maximum potential pen-

[8] The complete rejection in this country of the potential for unlimited, jury-imposed criminal fines supports a similar rejection under the Due Process Clause of unlimited, jury-imposed punitive fines in civil cases. No principled constitutional distinction can be drawn between criminal or civil fines as both are imposed to punish and deter. The Due Process Clause "is not to be avoided by the simple label the state chooses to fasten on its conduct or its statute." *Giaccio v. Pennsylvania*, 383 U.S. 399, 402, 86 S. Ct. 518, 15 L.Ed. 2d 447 (1966).

alty was known in advance by local rule, custom, or statute.[9]

Thus, although due process clearly permits sentencing authorities, whether judges or juries, considerable leeway in determining the appropriate *level* of punishment to be imposed in a particular case, such discretion is exercised only where its outer limits previously have been circumscribed and publicized. Once such limitation has been established, the maximum potential punishment for any given offense is readily ascertainable, and the amount of punishment actually imposed may be constrained by the Eighth Amendment. The Due Process Clause therefore fundamentally prohibits a system of unlimited punishments in which the amount imposed is calculated on an *ad hoc* basis in each case, even if the maximum amount is limited in some unspecified, nebulous, and ultimately meaningless fashion by the amount which the defendant is financially capable of paying.

Despite this prohibition, however, the parameters for awarding punitive damages have not yet been statutorily enunciated, an omission which, *perforce*, has resulted in a violation of Pacific Lighting's due process rights. In the present case, the jury did not receive one iota of guidance as to the standards for determining the amount of punitive damages imposed. As a result, Pacific Lighting essentially was at the mercy of an uncontrolled jury which could impose *any* amount of punitive damages, no matter how outrageous, without the threat of judicial censure. To allow such capricious awards not only serves to multiply a defendant's uncertainty as to the punishment which may

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[9] The fundamental principle that limits on punishments must be prescribed *in advance* of their imposition and that such limits may not be set by juries on an *ad hoc* basis is traced to the ancient latin canon, "Nullum Crimen, Nulla Poena, Sine Lege," the modern translation of which is: "There can be no crime, and no punishments, except as the law prescribes it." M. Frankel, Criminal Sentences 3 (1972).

accompany his "crime", but it nullifies the very concepts of fair play and justice embodied in the Due Process Clause itself.[10]

**2. The Jury's Capricious Punitive Damage Award Constitutes An Excessive Fine Imposed In Violation Of The Eighth Amendment To The United States Constitution.**

Moreover, to allow a jury the unfettered discretion to impose a "fine" in a civil case which greatly exceeds the monetary penalty imposed for a comparable crime violates both the letter and the spirit of the Excessive Fines Clause of the Eighth Amendment. The Eighth Amendment specifically provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. The theory underlying this prohibition is that a punishment must "fit" the crime and that crimes of equal magnitude should be punished similarly. *Solem v. Helm*, 463 U.S. 277, 284-85, 103 S.Ct. 300, 77 L.Ed. 2d 637 (1983). To the extent a civil jury, such as the one empanelled in the present case, has the power to impose an $800,000 fine for commission of a tort, intentional interference, which is a penalty amounting to roughly *800* times the penalty imposed for a comparable crime, fraud, such unrestrained punitive power leaves wide open the possibility that juries will "punish" civil defendants *not* in accordance with the magnitude of their "crime," but solely based upon their public image or the size of their bank accounts. Such a result completely defeats the purpose and protections of the

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[10] Such uncontrolled jury awards also violate the due process rights guaranteed by the California State Constitution. Article I, Section 13 of the California Constitution provides that "no person shall be deprived of property without due process of law," a stricture which is to be construed identically in scope and purpose with the Due Process Clause of the federal constitution. Cal. Const. Art. I, § 3; *Gray v. Whitmore*, 17 Cal. App. 3d 1, 94 Cal. Rptr. 904 (1971).

Eighth Amendment, thereby rendering the verdict against Pacific Lighting herein clearly unconstitutional.

This conclusion is not altered by the fact that Pacific Lighting's "punishment" is meted out in the form of civil punitive damages rather than in the form of a jail sentence or a criminal fine. Although punitive damages are not labeled "criminal", they are completely analogous to criminal punishments. But for the fact that the Excessive Fines Clause appears in an amendment which, on its face, addresses subjects such as "bail" and "cruel and unusual punishments", topics commonly associated with criminal rather than civil cases, the plain language of the Excessive Fines Clause reasonably could be interpreted to fully apply to any monetary "fine" imposed in any civil or criminal proceeding, regardless of whether the purpose of such a "fine" is limited to punishment and deterence. The Court therefore properly may conclude that a monetary fine imposed exclusively for purposes of punishment and deterence, the classic objectives of criminal penalties (*Trop v. Dulles*, 356 U.S. 86, 96, 78 S.Ct. 590, 2 L.Ed. 630 (1958)), was intended by the framers of the Constitution to fall within the rubric of the Excessive Fines Clause. Thus, any punitive damage award should be imposed only pursuant to clearly articulated standards and limitations. As the jury's punitive damage verdict against Pacific Lighting was rendered in the absence of such guidelines, its award cannot withstand the scrutiny of constitutional review and must be reversed.

* * *

DATED: February 28, 1989 Respectfully submitted,

GIBSON, DUNN & CRUTCHER
JOHN J. SWENSON
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/s/ Robert F. Serio
ROBERT F. SERIO

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